Filed 6/26/09 Marriage of Safaie-Hard and Mehr CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of NEGAR SAFAIE-FARD and HOOSHANG FARHANG MEHR .	
NEGAR SAFAIE-FARD, Respondent, v. HOOSHANG FARHANG MEHR, Appellant.	G039505 (Super. Ct. No. 04D009086) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Michael J. Naughton, Judge. Affirmed.

Law Offices of Arthur J. LaCilento and Arthur J. LaCilento for Appellant.

Fingal, Fahrney & Clark, and Christopher R. Clark for Respondent.

Hooshang Mehr appeals from an order denying him relief from an order requiring him to pay support in this marital dissolution action after the court had adjudicated the matter in an uncontested hearing. Mehr, who was acting in propria persona at the time, did not appear at the hearing, despite having been present when the court scheduled the date. Instead, five months later, he filed a motion to set aside the court's ruling, arguing it had been the product of "mistake, inadvertence surprise or neglect," as set forth in Code of Civil Procedure[1] section 473, because he had mistakenly believed he could obtain a continuance simply by calling the court on the date scheduled for the hearing. He now argues the court abused its discretion in denying him relief on that basis.

We disagree and affirm the order.

FACTS

The order at issue in this appeal is but one of several disputes comprising this rather messy marital dissolution dispute. It is sufficient for our purposes to note that the petition for dissolution was filed by Safaie-Fard in October of 2004. Thereafter, in December of 2005, Safaie-Fard filed an order to show cause for support and other relief.

In December of 2006, before the hearing on the order to show cause had taken place, Mehr's counsel was given permission to withdraw from the case, leaving Mehr without representation. In the course of that hearing, Mehr accused his counsel of over-billing him and acting improperly by suggesting he could do some home remodeling work for her in exchange for attorney services. The court noted that Mehr had taken a "rather adamant position" on the disputed issues in the case, and suggested that he might want to reconsider the "hardball" tactics that had likely been a contributing factor to his high legal fees. The court explained "[t]his is now time to think about whether or not it's

[1] All further statutory references are to the Code of Civil Procedure.

worth while to . . . stop blowing money on this kind of stuff, get the thing settled and get on with things."

After granting the attorney's motion to withdraw, the court set an evidentiary hearing for March 5, 2007, to address Safaie-Fard's order to show cause regarding support and other relief.

Apparently, Mehr determined that the date in question presented a conflict for him, and at some point[2] informed both the court clerk, and then counsel for his former wife, Negar Safaie-Fard, that he wished to continue it. In response to that suggestion, counsel for Safaie-Fard told Mehr that he would not agree to any continuance, and intended to proceed with the hearing on the scheduled date. Counsel also told Mehr that merely notifying the court of his unavailability was not sufficient to obtain a continuance of the hearing, and reiterated that he was obligated to be present on the scheduled date. Despite that warning, Mehr did nothing further to actually secure a continuance.

On the March 5, 2007 hearing date, Safaie-Fard and her attorney were both present in court, but Mehr was not. The court noted that Mehr had been present in court at the time the hearing was set, and that he had subsequently contacted the court to inform it he would be "out of the country and will not be appearing" on that date. The court then stated it would proceed with the hearing in Mehr's absence, and swore in Safaie-Fard to testify in support of her order to show cause.

On April 4, 2007, the court issued its formal order compelling Mehr to pay Safaie-Fard spousal support of $5,500 per month, retroactive to December 7, 2005, as well as child support of $3,628 per month for the period of December 7, 2005 through September 6, 2006, and $2,267 per month thereafter. On May 8, 2007, the order was personally served on Mehr, who, by that time, was again represented by counsel.

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[2] The exact timing of his telephone calls is in dispute. He contended that he phoned both the court clerk, and Safaie-Fard's counsel, on or about March 1, to inform them that he would be unable to appear at the scheduled hearing. Safaie-Fard's counsel declared that the phone call to him had taken place on February 22, 2007, and that he had returned the call, and spoken directly with Mehr, that same day.

On May 21, 2007, Mehr moved, ex parte, for a 90-day continuance of the June 5, 2007 trial date, so his counsel could adequately prepare for trial. On July 5, 2007, Mehr filed an order to show cause seeking a *modification* of the child and spousal support order at issue herein, stating in a declaration that the order should be modified "because I could not be present at the March 2007 hearing. I was representing myself and without the assistance of any attorney. [¶] In addition, since the order was made I have lost the family business and am not making any income."

On August 17, 2007, more than three months after he was served with the support order, and over a month after he requested that it be modified, Mehr moved to set it aside on the grounds of mistake, inadvertence, surprise or excusable neglect, pursuant to section 473. In his declaration in support of the motion, Mehr acknowledged he had been aware of the hearing date, and stated he had contacted Safaie-Fard's counsel "[o]n or about March 1, 2007" to request a continuance. He did not disclose how counsel reacted to the request. He also stated he had contacted the court, to "inform[] the court clerk of my unavailability." He claims he "did not receive any objection to my unavailability by the clerk." Based upon those conversations, Mehr asserted he had been "in the belief that the matter was going to be continued. . . ."

Safaie-Fard opposed the motion, arguing that Mehr had demonstrated no excusable neglect, since he admitted he was aware of the hearing date. She pointed out that when Mehr contacted her counsel to request a continuance, counsel unequivocally refused to agree, specifically told him that merely "notifying" the court that he was unavailable on the scheduled date was insufficient to secure a continuance, and expressly warned Mehr that they intended to proceed on the scheduled date. Safaie-Fard also argued that Mehr had not acted diligently in bringing his motion for relief, noting that he had made no effort to comply with the order, and had moved to vacate it only on the eve of trial.

The court denied the motion to vacate.

I

"'The first portion of . . . section 473, providing that the court "may" relieve a party from a dismissal, vests the trial court with the discretion to vacate a dismissal based on a party's or attorney's excusable neglect.' (*Todd v. Thrifty Corp.* [(1995)] 34 Cal.App.4th [986,] 991.) . . . . [¶] 'In contrast to the mandatory portion of section 473(b), 'discretionary relief under the statute is not limited to defaults, default judgments, and dismissals. . . .' (*English [v. IKON Business Solutions, Inc.* (2001)] 94 Cal.App.4th [130,] 149.) As the California Supreme Court recently observed: 'The discretionary relief provision of section 473, subdivision (b) applies to any "judgment, dismissal, order, or other proceeding."' (*Zamora [v. Clayborn Contracting Group, Inc.* (2002)] 28 Cal.4th [249,] 254.)" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419.)

"In order to qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 234.) "'The moving party has a double burden: He must show a satisfactory excuse for his default, and he must show diligence in making the motion after discovery of the default.'" (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625, quoting 8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, § 172, p. 575.)

In accordance with the usual rule on appeal, we must uphold the court's ruling if it is correct on any basis urged below. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 719; *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 663-664.) Thus, we first turn to the court's implied determination that Mehr did not act diligently in moving to vacate the support order.

Diligence is not established merely because the motion is made within six months of the challenged order; that time period is merely the outside limit, beyond which the motion cannot even be considered. What the statute specifies is that the application for relief "shall be made *within a reasonable time,* in no case exceeding six

months, after the judgment, dismissal, order, or proceeding was taken." (§ 473, subd. (b), italics added.)

In *Huh v. Wang, supra,* 158 Cal.App.4th 1406, the court concluded that an unexplained delay of approximately three months in bringing the motion for relief, from the point at which the moving party had become aware of the judgment, did not demonstrate diligence. (Citing *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523.) In this case as well, Mehr waited in excess of three months after receiving formal notice of the court's order, before moving to vacate it. He was represented by counsel during that entire three-month period. Moreover, in the interim, he moved to *modify* the order. He offers no explanation at all, let alone a reasonable one, for the long delay. On that basis alone, the court was justified in denying the motion.

But the court's decision was clearly justified on the merits as well. The central flaw in Mehr's argument is his apparent belief the court was somehow compelled to accept his assertion he believed in good faith that the hearing would be continued. However, the court was not required to believe his assertion, and there was plenty of evidence to suggest he should have known better. According to the declaration submitted by Safaie-Fard's counsel, when Mehr contacted him to request a continuance, counsel expressly informed him that (1) they would not agree to any continuance; (2) he could not unilaterally obtain one by simply informing the court of his unavailability; and (3) they intended to proceed with the hearing on the scheduled date. Thus, there was ample evidence to support the court's implied determination that Mehr was actually aware the hearing would be proceeding on the scheduled date and willfully chose not to be present. That implied finding is more than sufficient to support the conclusion Mehr's non-appearance was not "inadvertent," and was not the product of mistake, surprise or excusable neglect.

II

Mehr's other contentions are likewise insufficient to persuade us the court erred in refusing to vacate the support order.

Initially, Mehr asserts he was "never served proper legal notice" of the support hearing, because although he was personally present at the time the court scheduled the hearing, Safaie-Fard's counsel did not subsequently serve him with a written notice of the date, as ordered by the court. There are three problems with this argument. First, it was not raised below, and thus we are not required to consider it on appeal. (*Cardinal Health 301, Inc. v. Tyco Electronics Corp.*(2008) 169 Cal.App.4th 116, 155.)

Second, Mehr does not explain how due process might have entitled him to anything more than the in-person notice of the hearing given at the time it was scheduled. The fact that some courts employ a "belt and suspenders" approach to giving notice – particularly when a litigant is in propria persona – in no way demonstrates that such duplicative efforts are required to satisfy notions of due process. To the extent that Safaie-Fard's counsel failed to comply with the court's directive that he give Mehr an additional written notice, that is a matter to be resolved between the court and counsel; it does not *create* any expanded right to "notice" for Mehr.

And finally, it is undisputed that Mehr was not prejudiced by the lack of a second written notice of the hearing. He was clearly aware of the date.

Mehr also contends the court should have vacated the support order because he was "never served . . . with the approximate[ly] 200 page supplemental declaration filed by [Safaie-Fard] on the day of the hearing." However, the contention simply ignores the fact that the support hearing which he chose not to attend was an *evidentiary* hearing. The court was entitled to consider whatever evidence was presented at the hearing, subject to objections, and to consider it in making its decision. There is no abstract requirement that parties must serve their opponents with advance copies of all

the evidence they intend to present at a trial, and thus the court did not err in allowing Safaie-Fard to present her evidence.

Mehr's final contention is that the court should have vacated the support order because the evidence offered by Safaie-Fard in connection with the hearing was insufficient to sustain the court's ruling on the merits. Such a contention is not relevant in assessing the propriety of a motion to vacate under section 473, however, the only questions presented by such a motion are whether the moving party acted with diligence, and whether the challenged order was the product of mistake, surprise, inadvertence or excusable neglect. Consequently, the court would not have erred[3] in refusing to vacate the order on that basis.

The order is affirmed. Safaie-Fard is to recover her costs on appeal.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.

[3] It is not clear that Mehr raised this argument in support of his motion to vacate in the court below. He did protest that Safaie-Fard had committed fraud by offering "false financial information" to the court in support of her order to show cause, but he did not specifically complain that her evidence, if credited, would have been insufficient to support the decision in any case.